(1)

Supreme Court, U.S.
FILED

No. 98-___ 98 2040 JUN 17 1999

OFFICE OF THE CLERK

In The

Supreme Court of the United States

RANDALL GOURLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

GARY L. BLEDSOE
Counsel of Record
316 W. 12th St., Suite 307
Austin, TX 78701
(512) 322-9992
(512) 322-0840 Fax
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

3988

QUESTIONS PRESENTED

1. Whether as a matter of law the trial court violated the right against Self-Incrimination of the Fifth Amendment, the Fair Trial provision of the Sixth Amendment, or the Due Process Clause of the Fourteenth Amendment, when without notice to counsel it found by clear and convincing evidence that defendant obstructed justice under the United States Sentencing Guidelines, Section 3C1.1, 18 U.S.C. when (a) the defendant was convicted of the highest possible charge; (b) his testimony did not impede others from testifying for the prosecution; and (c) the co-defendant who testified consistent with the defendant was acquitted by the same jury.

2. Whether the Due Process Clauses of the Fifth and Fourteenth Amendments and the Fair Trial provision of the Sixth Amendment were violated when the court below approved the trial court's finding on partial remand that the videotape evidence tendered to the Fifth Circuit Court of Appeals was the same evidence used at trial in the face of affidavits and opinions to the contrary.

PARTIES TO PROCEEDING

The parties to the proceeding in the Court of Appeals were Randall Gourley and the United States.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO PROCEEDING..... ii

TABLE OF AUTHORITIES v

OPINIONS BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL PROVISIONS AND STATUTES... 1

STATEMENT OF THE CASE..... 1

(i) Proceedings in the Court Below..... 1

(ii) Facts 2

ARGUMENT 4

1. Whether as a matter of law the trial court violated the right against Self-Incrimination of the Fifth Amendment, the Fair Trial provision of the Sixth Amendment, or the Due Process Clause of the Fourteenth Amendment, when without notice to counsel it found by clear and convincing evidence that defendant obstructed justice under the United States Sentencing Guidelines, Section 3C1.1, 18 U.S.C. when (a) the defendant was convicted of the highest possible charge; (b) his testimony did not impede others from testifying for the prosecution; and (c) the co-defendant who testified consistent with the defendant was acquitted by the same jury..... 4

TABLE OF CONTENTS – Continued

Page

2. Whether the Due Process Clauses of the Fifth and Fourteenth Amendments and the Fair Trial provision of the Sixth Amendment is violated when the Court below approved the trial court's finding on partial remand that the videotape evidence that was tendered to the Fifth Circuit Court of Appeals was the same evidence used at trial in the face of affidavits and opinions to the contrary 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

U.S. v. Abitoye, 923 F.2d 221 (1st Cir. 1991) 5

U.S. v. Arnold, 106 F.3d 37 (3rd Cir. 1997) 4

U.S. v. Bueno, 21 F.3d 120 (6th Cir. 1994) 5

U.S. v. Dunnigan, 507 U.S. 87 (1993) 4

U.S. v. Gabriel, 125 F.3d 89 (2nd Cir. 1997) 4

U.S. v. Grayson, 478 U.S. 41, 98 S.Ct. 2610 (1978) 6

U.S. v. Hall, 160 F.3d 265 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 1091 (1998) 5

U.S. v. Iverson, 90 F.3d 1340 (8th Cir. 1996) 5

U.S. v. Montague, 40 F.3d 1251 (D.C. Cir. 1994) 5

U.S. v. Neal, 27 F.3d 1035 (5th Cir. 1994) 8

U.S. v. Selva, 559 F.2d 1303 (5th Cir. 1977) 8

STATUTES

U.S.S.G. 3C1.1 ..... 1, 5

28 U.S.C. § 1254 1

38 U.S.C. § 3742 2

CONSTITUTION

Fifth Amendment to the United States Constitution 1, 4, 6, 7

Sixth Amendment to the United States Constitution 1, 4, 6, 7

Fourteenth Amendment to the United States Constitution 1, 4, 6, 7

OPINIONS BELOW

The opinion of the United States Court of Appeals on original submission is reproduced in the Appendix at App. 1, and on petition for rehearing at App. 24.

JURISDICTION

In February, 1999, the Fifth Circuit Court of Appeals affirmed the conviction of the petitioner and the actions of the trial court. These decisions were reaffirmed on March 19, 1999 when the petition for rehearing was denied. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

The text of the following constitutional provisions and statutes are reproduced in the Appendix at App. 25.

U.S. Const., Amendments 5, 6 and 14
U.S.S.G. Section 3C1.1

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

Petitioner Randall Gourley was charged with conspiracy to illegally import cocaine into the United States and possession with the intent to illegally distribute the cocaine. The district court determined a total offense level of 10 with a criminal history category of I. The district

court sentenced Gourley to 300 months of imprisonment under a prescribed range of 292 to 365 months.

The appeal to the Court of Appeals was pursuant to 38 U.S.C. § 3742 and the Rules of Criminal and Appellate Procedure.

(ii) Facts

Randall Gourley studied Industrial Engineering at Southern Illinois University and left 18 hours short of graduation. Gourley was in the machine tools business, leasing warehouses to individuals to be used to repair trailers. United States narcotics agents discovered that a vehicle was carrying contraband, and followed the driver of the vehicle, Walter Mace, until he arrived at Gourley's warehouse. The agents took a videotape of their surveillance. The contraband is not shown while Gourley is in the warehouse. Gourley is a white individual, while co-defendant, Roy Garza, is Hispanic. An all Hispanic jury convicted Gourley and acquitted the co-defendant in a division of the judicial circuit that did not form the locale of the above events. Because the trial court concluded that the jury's verdict meant that the petitioner knew about the contraband it increased the petitioner's sentence to account for the alleged obstruction of justice. Gourley would have received fewer years as a sentence had the obstruction of justice charge not been applied. (Even with a 38 level he could possibly have been sentenced to 235 months, or 188 for a 36 as he claimed at trial). Importantly, the key prosecution witness, Mace, had a large sum of money deposited into his bank account after his arrest and Gourley had no such deposit

made on his behalf. In fact, Gourley is now represented by court-appointed counsel.

On appeal the United States took possession of the videotape involved over petitioner's objection. After it was requested by the petitioner for the appeal, a videotape was submitted to the court. However, the petitioner contends that the submitted tape was not identical to the original one. A panel of the Fifth Circuit partially remanded the case to the trial court to determine if the tape was the same. The trial court ruled that the tape was the same even though there was sworn testimony to support the contention that the tape was different. Petitioner had provided several affidavits from the co-defendant, the petitioner's son and others to the trial court. Ultimately, the United States Attorney did indicate that the tape was the same in a statement not taken under oath. However, counsel representing the co-defendant, Ms. Sylvia Yarborough, provided a letter indicating that it was different. The trial court refused to take sworn testimony of witnesses who were in the courthouse but who were not available when the actual tape was shown during the partial remand hearing. The tape submitted to the court had several scenes edited out, including the arrival of the truck to the warehouse carrying the petitioner. The edited out scene contradicts the argument that petitioner was involved in the contra band operation on-going at the warehouse.

ARGUMENT

1. **Whether as a matter of law the trial court violated the right against Self-Incrimination of the Fifth Amendment, the Fair Trial provision of the Sixth Amendment, or the Due Process Clause of the Fourteenth Amendment, when without notice to counsel it found by clear and convincing evidence that defendant obstructed justice under the United States Sentencing Guidelines, Section 3C1.1, 18 U.S.C. when (a) the defendant was convicted of the highest possible charge; (b) his testimony did not impede others from testifying for the prosecution; and (c) the co-defendant who testified consistent with the defendant was acquitted by the same jury.**

In *U.S. v. Dunnigan,* 507 U.S. 87 (1993), this Court recognized a body of law indicating that perjury is a part of a greater design to interfere with judicial proceedings. *Id.* at 93. The Court explained that a defendant could testify to matters and not be held responsible for perjury if there was lack of capacity, insanity, duress, self defense, confusion, mistake or faulty memory. *Id.* at 95. In that case, the Court indicated that there was no confussion, mistake or faulty memory, but made no findings as to duress or the other factors that could justify a finding of perjury.

The court below did not articulate fully the standard used in determining that perjury was committed. The trial court did indicate at one point that the standard was clear and convincing evidence. While some courts have held that a clear and convincing evidence standard is appropriate (*U.S. v. Gabriel,* 125 F.3d 89 (2d Cir. 1997), *U.S. v. Arnold,* 106 F.3d 37 (3d Cir. 1997) and *U.S. v.*

Montague, 40 F.3d 1251 (D.C. Cir. 1994)), there is also general agreement that the trial court is obligated to look at the perjury question in the light most favorable to the defendant (*U.S. v. Bueno*, 21 F.3d 120 (6th Cir. 1994)). The Sentencing Guidelines require as much. Other circuits have indicated that a defendant's sentence should not be increased based on perjurious testimony if a reasonable trier of fact could find the testimony true. *U.S. v. Iverson*, 90 F.3d 1340 (8th Cir. 1996). This was not done in this case.

The Fifth Circuit, by contrast, has held that a preponderance of the evidence standard was applicable. *U.S. v. Hall*, 160 F.3d 265 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 1091 (1998). The First Circuit has articulated yet another standard: "[a]n upward adjustment for obstruction of justice under U.S.S.G. § 3C1.1 requires more than a mere conflict in the trial testimony, or a jury's rejection of a defendant's alibi or denial of guilt." *U.S. v. Abitoye*, 923 F.2d 221, 229 (1st Cir. 1991). A defendant should be given the benefit of any doubt. *Id.* In this case, it is clear that the judge must have surmised that perjury existed on the basis of the jury's rejection of petitioner's testimony, as borne out by the guilty verdict. The court did not conduct an analysis to determine how the evidence may be viewed in a light most favorable to the defendant:

> I find that by clear and convincing evidence the defendant did give false and material testimony which was not the result of confusion, mistake or faulty memory, and specifically the defendant – that the Court finds that the defendant knew about the cocaine. He knew when, where, and how the cocaine was being delivered into Houston into these warehouses, specifically the

> warehouse on Signet. The defendant testified that these warehouses were being leased for the purpose of pipe cutting business, but the evidence shows that there was no real prospect for an increase in – in a pipe cutting business for the defendant but rather that these warehouses, specifically the warehouse on Signet, was leased for the purpose of providing a venue for the distribution of cocaine. . . .

Several independent business persons testified that Gourley was involved in a legitimate business operation. Moreover, during his trial testimony Gourley provided the address of another warehouse of which the agents were unaware. Evidence elicited in the middle of trial from Gourley was then used to find out that the same operation was apparently taking place at the other warehouse. It is inconceivable that Gourley would provide this information if he knew that similar activity was taking place, and that it would be used to convict him. Also, it is important to note that the co-defendant was acquitted even though his testimony was consistent with that of the petitioner. By not following the dictates of the official commentary to the guidelines that the issue of obstruction be interpreted in the light most favorable to the defendant, the trial court denied the petitioner his protection under the Due Process Clause of the Fourteenth Amendment and the Fair Trial Provisions in the Sixth Amendment. Further, permitting such an application of the guidelines will have a chilling effect on the use of a petitioner's Fifth Amendment right against Self-Incrimination. In *U.S. v. Grayson*, 478 U.S. 41, 57, 98 S.Ct. 2610, 2619 (1978), Justice Stewart said in a dissenting opinion that similar circumstances could cause a "rational fear that this truthful testimony will be perceived as

false." It is further important to note that by convicting the petitioner of perjury under a lesser standard, an offense he has never been allowed to stand trial for, the petitioner has been denied his Constitutional right to a fair trial as guaranteed by the Sixth Amendment.

2. **Whether the Due Process Clauses of the Fifth and Fourteenth Amendments and the Fair Trial provision of the Sixth Amendment were violated when the court below approved the trial court's finding on partial remand that the videotape evidence tendered to the Fifth Circuit Court of Appeals was the same evidence used at trial in the face of affidavits and opinions to the contrary.**

The jury argument made by counsel for co-defendant (who was acquitted), on the videotape stressed the time of arrival of the truck containing the co-defendant. This and other factors contained in the videotape were said to be crucial. On appeal, however, counsel for the petitioner had not been able to view this particular videotape. The videotape would have been crucial in illustrating the petitioner's defense. Furthermore, at the hearing on partial remand, no live testimony was taken even though an Assistant United States Attorney at some point said that it was the same tape. There was a number of sworn affidavits to the contrary and a letter from the attorney for the co-defendant (who was actually present). In order to have effective representation by court-appointed counsel on appeal it is important that all the evidence be provided. In the absence of such evidence, the Due Process Clauses of the Fifth and Fourteenth Amendments and the Fair Trial Provision of the Sixth Amendment

would be violated. The trial court deprived the petitioner of his right to effective assistance of counsel and to have the proper review of his *sufficiency of the evidence* claim. *U.S. v. Neal*, 27 F.3d 1035, 1044 (5th Cir. 1994); and *U.S. v. Selva*, 559 F.2d 1303 (5th Cir. 1977). Had the trial court determined that the videotape was different the petitioner would have been entitled to an acquittal if the tape was not subsequently produced. Though requests have been made, the petitioner's counsel has been provided no findings of fact by the trial court. This Court must address this issue so that the lower courts will have appropriate guidance.

CONCLUSION

This Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

GARY L. BLEDSOE
316 W. 12th Street, Suite 404
Austin, TX 78701
(512) 322-9992
(512) 322-0840 Fax
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-41206

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

VERSUS

RANDALL ELWOOD GOURLEY,

Defendant – Appellant.

(Filed Feb. 19, 1999)

Appeal from the United States District Court
For the Southern District of Texas

Before DeMOSS, PARKER, and DENNIS, Circuit Judges.

DeMOSS, Circuit Judge:

Randall Gourley raises numerous objections to his conviction and sentences on three drug-related offenses. We affirm.

I.

Along with several other defendants, Randall Gourley was charged and tried on three drug-related counts: conspiracy to import over five kilograms of cocaine (21 U.S.C. §§ 952(a), 960(b)(1), 963); conspiracy to

possess cocaine with intent to distribute over one thousand kilograms of cocaine (21 U.S.C. §§ 841(a)(1) & (b)(1)(A), 846); and possession with intent to distribute over one thousand kilograms of cocaine (18 U.S.C. § 2; 21 U.S.C. 841(a)(1) & (b)(1)(A)). The charges arose from a scheme in which cocaine was transported from Mexico to Houston, Texas in the roof of a large tractor trailer.

The prosecution introduced evidence at trial to establish the following facts. The tractor trailer containing the drugs was driven by Walter Mace. Mace testified that when he arrived in Houston, he was led to his final destination, a warehouse, by two men known to him as "Jose" and "Happy." The warehouse was leased by Gourley, who, along with others, was present at the time of the truck's arrival. Once the trailer was secured in Gourley's warehouse, the men involved stood together in a group. In Gourley's presence, Mace asked Jose where the cocaine was hidden in the trailer. Jose responded that the roof itself would have to be removed because the drugs were concealed in a secret compartment at the top of the trailer. Gourley heard these remarks and expressed no surprise.

Unbeknownst to this cast of characters, the drugs had been detected by customs agents stationed at the border near Laredo, Texas. The agents arranged to have the truck followed to its destination. After Mace delivered his cargo under the agents' surveillance, Gourley and his associates were observed leaving and returning to the warehouse. Ultimately, Gourley locked the fence around the warehouse, and everybody left in two trucks. Soon thereafter, Gourley was apprehended by the agents.

Inside the warehouse, customs agents removed the roof from the trailer and found approximately one ton of cocaine. Rivets similar to those the agents removed from the roof of the trailer were found strewn on the floor of the warehouse. Scales like those used to measure cocaine were also found, as well as chisels and moving boxes purchased on the day of the delivery.

Gourley was convicted by a jury on all counts. A presentence report was prepared, and Gourley entered three objections to it: (1) he claimed entitlement to a reduction for being a minor participant (U.S.S.G. § 3B1.2); (2) he objected to an increase for obstruction of justice (U.S.S.G. § 3C1.1); and (3) based on the previous two objections, he claimed that the appropriate total offense level was 36. These objections were overruled. Based on a stipulated amount of 907.3 kilograms of cocaine, the district court determined a total offense level of 40, with a criminal history category of I. Within the prescribed range of 292 to 365 months of imprisonment, the district court sentenced Gourley to 300 months of imprisonment.

Gourley now timely appeals from his conviction and sentence.[1]

---

[1] In his appellate brief, Gourley alleged that the surveillance videotape entered into evidence at trial by the government had been altered at some point in time after his conviction, and that this circumstance rendered his appellate counsel (who was not trial counsel) from providing competent representation. *See, e.g., United States v. Silva*, 559 F.2d 1303, 1305 (5th Cir. 1977). The district court did permit the government to withdraw the exhibit for use in another trial, conditioned on the government providing an exact copy of the tape for the record of Gourley's trial, and there was some legitimate confusion

II.

Gourley contends that the evidence adduced by the government is insufficient to support the three counts of conviction. He contends that he did not know that there was cocaine in the trailer, and he suggests that his knowledge of the contraband was not proved and cannot be inferred from the fact that he rented and controlled the warehouse. He also compares his case to other cases in which this Court reversed conspiracy convictions on the ground that participation in a conspiracy cannot be proved by mere association with persons involved with drug transactions. He contends that Mace's testimony cannot provide the evidence to support his convictions because it is "patently unbelievable,"[2] and he asserts that

---

about whether the tape in the record was accurate. Gourley contended that the tape now in the record had been edited to excise certain exculpatory material. Pursuant to Fed. R. App. P. 10(e), we remanded the matter to the district court for the limited purpose of settling the dispute, and the district court has confirmed that the videotape in the appellate record is identical to the videotape that was shown at trial. We therefore consider the issue raised by Gourley as to the accuracy of the record and his ability to prepare an appeal to be conclusively resolved.

[2] Gourley asserts, without specificity, that "the videotape shows Walter Mace not to be telling the truth." He also suggests that various "facts" concerning Mace render his testimony suspect, including: (1) he was cooperating with the government; (2) $47,000 was deposited into one of his bank accounts, yet he claimed not to know this; (3) drug conspirators paid for his legal representation; (4) he failed to identify a "non-apprehended drug conspirator" with whom he spent two weeks; (5) he claimed that he was in Waco at a time when he was not; (6) he falsely told the judge at his detention hearing that he owned a trucking business; and (7) he testified incompletely with respect to who was involved in preparing him for his testimony.

evidence supports his contention that he was renting the warehouse incident to his legitimate machine shop business,[3] and he was unaware of drug activity.

We review the sufficiency of the evidence offered against Gourley to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *see United States v. Stevenson*, 126 F.3d 662, 664 (5th Cir. 1997). "All evidence and inferences from the evidence are to be viewed in the light most favorable to the government." *Stevenson*, 126 F.3d at 664; *see also Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789. "The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and this court will accept all credibility choices that tend to support the verdict." *Stevenson*, 126 F.3d at 664. We are "required to accept all credibility choices that tend to support the jury's verdict." *United States v. Johnston*, 127 F.3d 380, 401 (5th Cir. 1997) (internal quotation marks omitted), *cert. denied*, 118 S. Ct. 1173 (1998).

---

[3] The evidence identified by Gourley to support his involvement in legitimate business includes testimony by a prosecution witness that Gourley: (1) appeared to have a legitimate business "there" (presumably at the warehouse); (2) talked about office machines at the warehouse; and (3) wore a uniform and had greasy hands. Gourley also points to record evidence of examples of specific business transactions to prove that he was involved in legitimate business.

A.

With respect to Gourley's conviction for possession of drugs with intent to distribute, the government must prove (1) knowing (2) possession of the drugs (3) with intent to distribute. *See* 21 U.S.C. 841(a)(1) ("[I]t shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]"); *see also United States v. Delagarza-Villarreal*, 141 F.3d 133, 140 (5th Cir. 1997); *United States v. Diaz-Carreon*, 915 F.2d 951, 953 (5th Cir. 1990); *United States v. Johnson*, 469 F.2d 973, 976 (5th Cir. 1972). Possession for these purposes may be either actual or constructive. *See United States v. Pigrum*, 922 F.2d 249, 255 (5th Cir. 1991); *United States v. Felts*, 497 F.2d 80, 82 (5th Cir. 1974).

Mace testified at trial that Gourley and the others were present when Jose disclosed where the cocaine was hidden.[4] Based on this evidence, the jury could conclude that Gourley and the others heard the statement, and therefore knew about the drugs. *See United States v. Gant*, 119 F.3d 536, 540 (7th Cir. 1997) (citing James Boswell, *The Life of Johnson* 333 (R.W. Chapman ed., Oxford Univ. Press 1980) (1791)). As in *Gant*, there is no suggestion that Gourley may not have heard the comment because of other noise, because it was whispered, or because

---

[4] Among a number of facts corroborating Mace's testimony, perhaps the most compelling are the lack of evidence of any legitimate activity that Gourley was conducting at the warehouse and Gourley's lack of a source of legitimate business that could support the $5,000 monthly warehouse rental obligation.

Gourley had some hearing impairment, and therefore common sense dictates that the jury rationally inferred Gourley's knowledge about the presence of drugs. The record contains evidence that Gourley controlled the warehouse. The jury could infer from this fact that he provided the warehouse to store drugs and therefore constructively possessed the drugs stored therein. *See, e.g., Pigrum*, 922 F.2d at 255 (" 'Constructive possession' is ownership, dominion, or control over illegal drugs or dominion over the premises where drugs are found."). Finally, the sheer quantity of drugs involved supports an inference of intent to distribute, because one ton of cocaine is much more than Gourley and his companions could have hoped to personally use. *See United States v. Inocencio*, 40 F.3d 716, 724 (5th Cir. 1994); *United States v. Pineda-Ortuno*, 952 F.2d 98, 102 (5th Cir. 1992); *United States v. Kaufman*, 858 F.2d 994, 1000 (5th Cir. 1988). Thus, there is evidence to support each element of 21 U.S.C. 841(a)(1), and the jury's verdict must be affirmed.

B.

With respect to Gourley's conviction on charges of conspiracy to import cocaine in violation of 21 U.S.C. § 952(a),[5] and conspiracy to possess with intent to

---

[5] *See* 21 U.S.C. § 963 ("Any person who attempts or conspires to commit any offense defined in this subchapter [including 21 U.S.C. § 952(a)] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."). The substantive offense Gourley conspired to commit provides:

distribute cocaine in violation of 21 U.S.C. § 841(a)(1),[6] the government must prove the evidence establishes beyond a reasonable doubt that (1) an agreement existed between at least two non-government people to import and possess the controlled substance with intent to distribute, (2) the defendant knew of the conspiratorial agreement, and (3) he intentionally participated in the conspiracy. *See also Inocencio*, 40 F.3d at 725; *United States v. Toro*, 840 F.2d 1221, 1232 (5th Cir. 1988). A conspiracy may be proved by circumstantial evidence, *see, e.g., United States v. Cardenas*, 9 F.3d 1139, 1157 (5th Cir. 1993), and "the government need not prove that the defendant knew of all the details, only that he knew of the conspiracy's essential purpose." *United States v. Osgood*, 794 F.2d 1087, 1094 (5th Cir. 1986). "In addition, a conviction for

---

> It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter. . . .

21 U.S.C. § 952(a).

[6] *See* 21 U.S.C. § 846 ("Any person who attempts or conspires to commit any offense defined in this subchapter [including 21 U.S.C. § 841(a)(1)] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."). The substantive offense Gourley conspired to commit provides: "[I]t shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]" 21 U.S.C. § 841(a)(1).

conspiracy to import a controlled substance may be sustained although the defendant engaged only in the conspiracy's distribution or delivery aspects after the contraband entered the country; importation is not complete until the drugs reach their final destination." *Id.* (citing *United States v. Mitchell*, 777 F.2d 248, 261-62 (5th Cir. 1985)).

Gourley did not merely rent the warehouse or turn up in the wrong place at the wrong time.[7] There was an agreement to import and possess cocaine with intent to distribute. Numerous individuals, including Gourley, his codefendant Roy Garza, Jose, and Happy, gathered at the warehouse and were present and waiting when the drugs arrived. These individuals participated in the drug transaction and acted in concert to recover hidden drugs from the tractor trailer. This evidence, combined with the entirely suspicious circumstances of the warehouse rental, *see supra* note 4, establishes a basis on which reasonable jurors could certainly conclude that these individuals had a prior agreement to act in concert to achieve the essential purpose of bringing drugs into the country and possessing those drugs in order to sell them to

---

[7] Gourley has directed the Court's attention to a number of cases in which a conviction hinged on a defendant's single tangential relation to drugs or a drug conspiracy which may have been coincidental and which, standing alone, was objectively innocuous. *See, e.g., United States v. Blessing*, 727 F.2d 353 (5th Cir. 1984). In that scenario, we agree that a single thin thread of circumstantial evidence cannot uphold the prosecution's burden of proving guilt beyond a reasonable doubt. As explained in the text, however, that was not the situation in this case.

others. As previously noted, the great quantity of drugs involved supports an inference of intent to distribute, *see, e.g., Pineda-Ortuno*, 952 F.2d at 102, and participation in distribution or delivery can support an inference of conspiracy to import, *see Osgood*, 794 F.2d at 1094. The jury's inference of an agreement is therefore supported by evidence.

Gourley's knowledge of the agreement and participation in the conspiracy are likewise supported by the evidence. The record contains evidence that Gourley controlled the warehouse. He was present at the time of delivery and was party to a conversation discussing the location of the drugs. The jury could infer from this evidence that Gourley provided the warehouse to store drugs, a fact which would support an inference of his participation in the conspiracy. *See Osgood*, 794 F.2d at 1094; *Mitchell*, 777 F.2d 248, 262 (5th Cir. 1985). Moreover, Gourley was present while the other men worked to remove the roof of the trailer. The jury could infer Gourley's participation in the conspiracy from this fact, as "criminals rarely welcome innocent persons as witnesses to serious crimes and rarely seek to perpetrate felonies before larger-than-necessary audiences." *United States v. Ortiz*, 966 F.2d 707, 712 (1st Cir. 1992). Finding that the elements of the conspiracy charges against him were supported by evidence, we affirm Gourley's conviction on the charged conspiracy offenses.

III.

Gourley challenges the transfer of his case from the Houston Division of the Southern District of Texas to the

Laredo Division, contending that defending the case in Laredo subjected him to unspecified "extreme disadvantage." He notes that "[t]here was no basis for the appellant to be tried outside of his home area by a jury completely not of his race." He also challenges the district court's refusal to transfer his case back to Houston. Gourley concludes that his rights under the Fifth and Sixth Amendments to the United States Constitution were violated.

The Court reviews the denial of a motion for intradistrict transfer for abuse of discretion. *United States v. Gonzalez*, 163 F.3d 255, 259 (5th Cir. 1998); *cf. Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 28, 108 S. Ct. 2239, 2243 (1988) (motions to transfer venue are reviewed for abuse of discretion). A "strong showing of prejudice" is required to justify an intradistrict transfer. *See United States v. Duncan*, 919 F.2d 981, 985 (5th Cir. 1990).

The denial of this motion did not constitute reversible error. Gourley has alleged no prejudice, and he makes no serious argument that the district court abused its discretion. The record demonstrates that the transfer was originally sought because most of Gourley's witnesses resided in Houston. This circumstance does not mandate an intradistrict transfer, as the inconvenience to Gourley of going to trial in Laredo would be "minimal at best in this age of convenient travel, communication, discovery, and trial testimony preservation." *Smith v. Colonial Penn Ins. Co.*, 943 F. Supp. 782, 784 (S.D. Tex. 1996). Since Gourley called many witnesses during the trial and failed to point to specific evidence of prejudice,

it stands to reason that he was not prejudiced. Furthermore, the Constitution does not require,[8] and, indeed, forbids,[9] an intradistrict transfer based on the anachronistic racial justification offered by counsel.

IV.

Gourley claims that the district court erred when it increased his offense level for obstruction of justice pursuant to U.S.S.G. § 3C1.1. Because Mace was the only witness who directly contradicted Gourley's testimony, Gourley contends that Mace was "auditioning for a lenient plea bargain," and the videotape supports his

---

[8] "There is no constitutional right to be tried in a particular division within a district." *United States v. McKinney*, 53 F.3d 664, 673 (5th Cir. 1995) (citing *United States v. Anderson*, 328 U.S. 699, 704-05, 66 S. Ct. 1213, 1216-17 (1946)).

[9] *See* U.S. Const. amend. V ("No person . . . shall be . . . deprived of life, liberty, or property, without due process of law. . . . "); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128, 114 S. Ct. 1419, 1421 (1994) ("[W]hether the trial is criminal or civil, *potential jurors*, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." (emphasis supplied)) (citing, inter alia, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077 (1991)); *United States v. Leslie*, 813 F.2d 658, 659 (5th Cir. 1987) ("[T]he Fifth Amendment's due process clause, applicable to the United States, has been construed to implicitly include an equal protection guaranty generally as broad as that of the Fourteenth Amendment.") (citing *Buckley v. Valeo*, 424 U.S. 1, 93, 96 S. Ct. 612, 670 (1976)); *see also McKinney*, 53 F.3d at 673 ("An attempt to influence the racial balance of the jury by setting a case in a particular division would not have been appropriate or acceptable. . . . ").

version of the facts and contradicts Mace's rendition. Gourley thus contends that it was clear error for the district court to conclude that he must have lied. Moreover, he notes that much of his testimony was not contradicted in any way. He should not be punished, he reasons, for simply exercising his right against self-incrimination.[10]

"A district court's findings of fact for purposes of applying the Sentencing Guidelines are reviewed under

---

[10] Gourley invites us to reconsider the holding in *United States v. Storm*, 36 F.3d 1289 (5th Cir. 1994), in which this Court rejected the suggestion that a district court must determine that "no reasonable trier of fact could have found the defendant's testimony true" to enhance a defendant's sentence pursuant to U.S.S.G. § 3C1.1. Under this Court's established practice that one panel may not overrule the precedents established by previous panels, this option is not available to us. *See, e.g., Earles v. State Bd. of Certified Pub. Acc'ts*, 139 F.3d 1033, 1036 n.6 (5th Cir.), *cert. denied*, 119 S. Ct. 444 (1998).

Gourley also sets his sights higher and argues that applying this sentencing enhancement based on a preponderance-of-the-evidence standard rather than the beyond-a-reasonable-doubt standard impedes his constitutional right to testify in his own defense. Gourley did not object to the sentence enhancement on constitutional grounds in the court below, and he does not develop what would be a complex argument on appeal. Thus, that point can only be considered for plain error. *See, e.g., United States ex rel. Wallace v. Flintco Inc.*, 143 F.3d 955, 971 (5th Cir. 1998). Regardless, the Supreme Court has expressly rejected this argument, noting that "a defendant's right to testify does not include a right to commit perjury," and "[o]ur authorities do not impose a categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions whether or not to exercise constitutional rights." *United States v. Dunnigan*, 507 U.S. 87, 96, 113 S. Ct. 1111, 1117 (1993).

the 'clearly erroneous' standard of review." *United States v. Powell*, 124 F.3d 655, 663 (5th Cir. 1997) (internal citation omitted). The district court did not clearly err in its determination that Gourley obstructed justice by lying on the stand. The district court made specific factual findings regarding the truthfulness of Gourley's testimony, concluding that Gourley lied about his knowledge of the criminal activity – specifically, Gourley knew about the cocaine, and knew when, where, and how the cocaine was being delivered. The court also concluded that Gourley committed perjury when he testified that the warehouse had been leased for legitimate business purposes. These determinations were supported by evidence in the record and thus were not clear error.

V.

Gourley contends that even in the worst-case scenario, his participation in the scheme was minor – he was a mere link in the chain – and therefore he should have received a reduction pursuant to U.S.S.G. § 3B1.2(b). He offers no case authority or analysis of the Guidelines to support this position.

The district court's decision not to give Gourley an adjustment for his "minor" role was not clearly erroneous. The commentary to the Guidelines notes that the adjustment is intended for the "defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant." U.S.S.G. § 3B1.2 comment. (backg'd). Given the district court's factual finding that Gourley was a "vital link" in the

conspiracy, a decreased sentence was not justified. Precedent supports declining to permit the "minor participant" reduction in a case such as this. *See United States v. Martinez-Moncivais*, 14 F.3d 1030, 1039 (5th Cir. 1994) (reduction not warranted because a guilty verdict on drug conspiracy charges "by definition entailed the jury's finding that [the defendant] had knowledge of, and voluntarily participated in, the ongoing transportation of entire truckloads of narcotics").

VI.

Gourley asserts that "[t]he prosecution offered no evidence actually showing actual possession, and it is clear the same evidence convicted him on both conspiracy and possession charges." To the extent that this is a sufficiency of the evidence argument, that contention has been addressed supra. To the extent that this argument suggests that the same evidence cannot support the various convictions in this case, it is simply wrong. *See United States v. Singh*, 922 F.2d 1169, 1173 (5th Cir. 1991) ("Typically, the same evidence will support both a conspiracy and an aiding and abetting conviction.")).

VII.

For the aforementioned reasons, the judgment of the district court is AFFIRMED.[11]

---

[11] With respect to Gourley's contentions that the district court made erroneous evidentiary rulings and wrongly denied a motion for continuance, we simply observe that the conclusory presentation of these assignments of error renders these points insusceptible to serious appellate review. Under our procedural rules,

> The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

Fed. R. App. P. 28(a)(6).

Gourley provides absolutely no authority for assignment of error on the district court's evidentiary rulings – no Rules of Evidence, no case law, not anything. Our usual practice is not to entertain such points on appeal. Moreover, given the highly deferential standard of review for evidentiary rulings (*i.e.*, abuse-of-discretion review of preserved objections on evidentiary rulings which affect the defendant's substantial rights, *see* Fed. R. Evid. 103(a)), there is no chance that Gourley could prevail on these points without showing through argument that the district court ruled erroneously, and that the effect of those rulings was serious prejudice to Gourley's defense. Gourley has made no effort to satisfy these standards, and therefore his evidentiary points do not merit consideration.

Likewise, no argument has been provided concerning the district court's denial of Gourley's motion for a continuance of his trial. The only justification for this request was that "counsel had a conflicting setting." Gourley contends that the denial of

his motion for continuance "[c]learly . . . affected a number of factors during trial." Our Court reviews a district court's denial of a motion for continuance for "abuse of discretion resulting in serious prejudice." *United States v. Pollani*, 146 F.3d 269, 272 (5th Cir. 1998) (citing *Avery v. Alabama*, 308 U.S. 444, 446, 60 S. Ct. 321, 322 (1940); *United States v. Dupre*, 117 F.3d 810, 823 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 857 (1998)). Gourley's utter failure to satisfy the requirements of Rule 28(a)(6) and to demonstrate abuse of discretion and prejudice therefore require affirmance on this point.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-41206

United States of America,

Plaintiff – Appellee,

VERSUS

Randall Elwood Gourley,

Defendant – Appellant.

Appeal from the United States District Court
For the Southern District of Texas, Laredo

(Filed Sep. 02, 1998)

Before DeMOSS, PARKER and DENNIS, Circuit Judges.

ORDER

Pursuant to FRAP Rule 10(e), this case is remanded to the district court for the limited purpose of determining whether the video tape now on file in the records of appeal of this case is a true and correct copy of the video tape introduced in evidence during the trial of this case. The trial court shall hold such evidentiary hearing as may be necessary to make this determination and file an appropriate report as to its findings. The clerk of this court shall transmit the video tape now on file in this court to the clerk of the district court for the purposes of

this determination. The report of the district court shall be submitted to the panel to which the case was assigned for oral argument on September 1, 1998 and further handling of this appeal will be determined by the same panel in light of such report. This court retains jurisdiction of this case except for the limited purposes stated herein.

/s/ Harold R. DeMoss, Jr.
Judge Harold R. DeMoss, Jr.
For the Court

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-41206

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RANDALL ELWOOD GOURLEY,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas

(Filed Oct. 15, 1998)

Before DeMOSS, PARKER, and DENNIS, Circuit Judges.

BY THE COURT:

By Order filed September 2, 1998, we remanded the above referenced matter for the limited purpose of determining whether the video tape now on file in the records of appeal of this case is a true and correct copy of the video tape introduced in evidence during the trial of this case. By Order dated September 17, 1998 and filed herein on September 22, the district court reported that two of the tapes delivered to it by the clerk of the Circuit Court were identical and one of the tapes does not pertain to this case. While this report is a step in the right direction, it does not resolve the controversies which prompted our

limited remand of this case to the district court. Accordingly, pursuant to FED. R. APP. P. 10(e), we again remand this case to the district court for the limited purpose of answering the following questions and requests:

> 1. Which one, if any, of the three video tapes now in the appellate record of this case was the tape introduced into evidence and shown to the jury during the trial of this matter (hereinafter "the tape in evidence")?
>
> 2. At the conclusion of the trial or thereafter, was the tape in evidence removed from the possession of the deputy district clerk prior to the submission of the record on appeal to this Court? If so, who took custody of this tape and for what purpose?
>
> 3. Was a copy of the tape in evidence (hereinafter "the duplicate tape") made for any purpose? If so, who made the duplicate tape and for what purpose, and is the duplicate tape a true, complete and correct copy of the tape in evidence?
>
> 4. The appellant contends that the tape in evidence (or the duplicate tape) has been edited or changed in some way by deletion or redaction such that it does not now depict some surveillance activities as it did when shown to the jury. Is there a genuine issue of fact raised by these contentions? If so, we ask that the district court resolve that factual controversy.

The clerk of the Circuit Court is instructed to return to the district court the three tapes delivered to this Court with the district court's Order of September 17, 1998. The district court shall hold an evidentiary hearing, or otherwise receive evidence and testimony in affidavit form,

sufficient for it to answer the questions and make the factual determinations set forth above. The district court shall file a written report of its findings and such report shall be submitted to the panel to which this case was assigned for oral argument on September 1, 1998. Further handling of this appeal will be determined by such panel in light of such report. This Court retains jurisdiction of this case except for the limited purposes stated herein.

/s/ Harold R. DeMoss, Jr.
JUDGE HAROLD R. DEMOSS, JR.
For the Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA	§	
	§	CRIMINAL NO.
vs	§	L-96-130-S
RANDALL ELWOOD GOURLEY, ET AL.	§	

ORDER

(Filed Jul. 23, 1997)

It is hereby ORDERED that the Government's Motion to Withdraw Exhibits be GRANTED. However, the clerk shall first make clear copies of all removed exhibits for purposes of other defendants' appeals. Also, the Government should only withdraw those exhibits needed for trial of defendant Telly Torres.

/s/ G.P. Kazen
7/23/97

DONE at Laredo, Texas, this ___ day of ___, 1997

CHIEF UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-41206

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

RANDALL ELWOOD GOURLEY

Defendant – Appellant

Appeal from the United States District Court
for the Southern District of Texas, Laredo

ON PETITION FOR REHEARING

(Filed Mar. 19, 1999)

Before DeMOSS, PARKER, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. DeMoss, Jr.
United States Circuit Judge

AMENDMENT V – GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI – JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV – CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PART C – OBSTRUCTION

Section 3C1.1. Obstruction or Impeding the Administration of Justice

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

3. The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:

(b) committing, suborning, or attempting to suborn perjury: